No. 86-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL AND ROTARY DISTRICT 530,

Appellants,

vs.

ROTARY CLUB OF DUARTE, MARY LOU ELLIOT and ROSEMARY FREITAG.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT

APPELLEES' BRIEF

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QUESTIONS PRESENTED

1. Should the Court dismiss the appeal because the record does not provide an adequate basis upon which to decide the questions posed by the appellants?

2. Do the associational interests of a large, public service organization override the application of California's public accommodations statute?

3. Is the California public accommodations law unconstitutionally vague or overbroad?

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JURISDICTION

This Court has no jurisdiction over this appeal. The issue of the validity of the California public accommodations law (the "Unruh Act") as being repugnant to the Constitution of the

United States was not drawn into question in the proceedings below, as required by 28 U.S.C. section 1257(2).

The quotations on pages 3 and 4 of appellants' ("International") brief demonstrate that they did not question the validity of the Unruh Act in the manner necessary to invoke this Court's appellate jurisdiction under that section. See, e.g. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 562 n.4 (1980); Hanson v. Denckla, 357 U.S. 235, 244 (1958); Stern, Gressman & Shapiro, "Supreme Court Practice" 113 (6th ed. 1986).

International argued in the courts below that its federal rights prevented the application of the statute to it, not that application of the statute to its set of facts would render the statute void under federal law.

Charleston Federal Savings & Loan Association v. Alderson, 324 U.S. 182 (1945), quoted by International [at 4-5], supports appellees ("Duarte"), not International. As Stern, Gressman & Shapiro states, citing Alderson in support,

> "[I]t is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law. If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be

had in the Supreme Court only via certiorari under §1257(3)." At 113.

That is the case here.[1]

STATEMENT OF THE CASE

Rotary International is a public service organization [Joint Appendix ("J.A.") 35] of 19,788 clubs[2] in 157 countries. [Appellants' brief ("app. br.") 7] In 1982 the total individual membership for all of the clubs was 907,750. [Id.] The average size is therefore 46 members, with a range from fewer than 20 members to more than 900. [Appendix to Jurisdictional Statement ("J.S. App.") G-15]

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[1]If the Court agrees, as we believe it should, that jurisdiction does not lie, we urge that certiorari not be granted. This matter is argued more fully at point IV of this brief.

[2]Rotary has since grown to over 21,000 clubs. 1 Gale, Encyclopedia of Associations 1053 (21st ed. 1987).

A fundamental principle of International is that the local clubs are substantially autonomous. [J.A. 35] Members join Rotary through the local clubs [J.A. 79] and each club drafts its own by-laws, which include the method it uses to enlarge its membership. [J.A. 88; exh. A-3 to deposition of Herbert A. Pigman, International's general secretary, 1981 Manual of Procedure ("Manual") 315 (see J.S. App. G-6-8)] Although International has recommended procedures for admitting new members (as detailed in its brief at 7-8), it does not require the clubs to abide by these requirements. [J.S. App. G-18]

Individual clubs do not have any authority over the admission to membership of new clubs in Rotary International. The members of the clubs have

no authority over who may become members of the other clubs. [J.A. 53] While the admission of new clubs is nominally within the authority of the 17-man board of directors [Manual 247], it is International's general secretary who actually decides which ones are admitted. [J.A. 53]

When clubs become affiliated with International, there are certain minimal rules they are obliged to follow. These rules include having only business, crafts and professional men as members [J.A. 35, 61], meeting once a week [Manual 303], and accepting at their meetings any Rotarians visiting from other clubs. [J.A. 85] They are also required to use International's classification system [J.A. 86-88; Manual 239-40, 303-04], which in theory

limits membership to one person per profession, business or craft classification. [J.A. 61; Manual 240] Clubs must charge new members an admission fee of at least $20 and annual dues of at least $25. [J.A. 51] Finally, both International and the local clubs are prohibited from taking any political or religious positions. [J.A. 59; Manual 309; S.J. App. G-47, 65]

International continually strives for growth, both in the number of clubs [J.A. 50-54; J.S. App. G-33; Manual 292] and within each individual club. [J.A. 61-66, 70-73] International's board of directors has a duty to extend Rotary throughout the world by the organization of new clubs. [Manual 292] Clubs are grouped into districts, with a district governor in charge of each one. [J.A. 48] District governors are

expected to organize a Rotary Club in every community. [Id.] An objective of Rotary International is to include in each local club a representative from every business, profession and institution in the community, and the district governors are also expected to help each club fill these membership objectives. [J.A. 36] There is no upper limit to the size of a club. [J.A. 61-62]

Rotary International's wide-ranging activities include a secretariat of 300 persons with offices in six countries [J.A. 36] and 403 district governors worldwide. [J.S. App. G-14] Its business operations run into millions of dollars a year [J.A. 52, 56, 67, 74-75; Manual 297; J.S. App. G-5] and it maintains a busy publishing house, "producing books, manuals, pamphlets,

and periodicals" in as many as 19 languages [J.A. 83] and numbering in the hundreds. [J.S. App. G-5]

Public relations is used to achieve growth. International and the clubs publicize their activities. [J.A. 22-23, 41-42, 46, 49, 60, 64, 70-73, 95-96] Signs are hung by the road to announce Rotary's presence in town. [J.A. 44] The number of media representatives who may be members is unlimited [J.A. 88], and local clubs are encouraged to have full representation of the press on their rosters. [J.A. 40] Clubs are asked to have non-Rotarians at their meetings to inform the community about Rotary [J.A. 25, 39, 66-67] and are urged to provide speakers about Rotary to other groups. [J.A. 40] They are to inform the public what Rotarians are doing in the community [J.A. 42]

and try to have their weekly meetings reported in the local press. [J.A. 71] Clubs have joint meetings with other service clubs [J.A. 39] and community organizations. [J.A. 42] The general public is involved in Rotary activities. [J.A. 41-43, 77]

International licenses commercial firms to use its official emblem and receive royalties for the use. [J.A. 67] International's magazine, "The Rotarian" [exh. F to Pigman deposition; J.S. App. G-43], solicits commercial advertising [J.A. 74] and is sold to libraries, hospitals, schools and other reading rooms. [Manual 319] An annual directory is published "[f]or the convenience of Rotarians who travel," listing hotels owned or operated by Rotarians. [J.A. 75]

It is common practice for members of local clubs to deduct their dues from their income taxes or to have the dues paid by their companies. [J.S. App. C-25-26; R.T. 68-69; J.A. 34] International encourages local clubs to have members give "confidential business advice and assistance to Rotarians who may request such help" and urges clubs to provide clinics for discussing economic problems. [J.A. 40] It issues publications that illustrate business problems and their solutions [J.A. 24] and holds meetings at which Rotarians learn management techniques that help increase their business or professional skills. [J.A. 14]

Although International's rules prohibit the admission of women into local clubs, women do participate in

Rotary activities. [J.A. 44-45, 68] They attend meetings [J.A. 25, 39, 67], and young women 14 to 28 years old may join Interact or Rotaract, organizations sponsored by International. [Manual 193, 198, 204] International encourages the participation of women relatives of Rotarians in "ladies committees" and other associations of women relatives of Rotarians [J.A. 44-45, 68], and these women are authorized to wear the Rotary lapel button. [J.A. 68]

PROCEEDINGS

In 1977, the Rotary Club of Duarte ("Duarte") admitted women into its organization. Subsequently, Rotary International and its District 530 ordered Duarte to expel its women members. When Duarte refused, International expelled the club itself. [J.S. App. C-7-8]

After following International's internal appeal procedures to no avail, Duarte and its women members filed this lawsuit charging International with violating, inter alia, the Unruh Civil Rights Act, California Civil Code section 51. [J.S. App. C-8]

At the trial there were no disputed facts relating to the issues raised in this appeal.[3] The Los Angeles Superior Court held that International had not violated the Act.[4] The California

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[3]The only facts in dispute related to an estoppel cause of action which was not appealed.

[4]The findings of fact International ascribes to the trial court [see, e.g., app. br. 6, 9, 10, 11, 12] were legal conclusions based on uncontested facts. An appellate court is not bound by a trial court's "findings" when there is no conflicting evidence presented. Harry Gill Co. v. Superior Court, 238 Cal. App. 2d 666, 670, 707 P.2d 195, 48 Cal. Rptr. 93 (1965).

Court of Appeal reversed, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986) [J.S. App. C], holding that the application of International's male-only rule to Duarte violates the Unruh Act.

The court of appeal later modified its opinion by revising its earlier statement that "the membership criteria set forth by International . . . is selective . . . ." [Cited at app. br. 9 and appearing at J.S. App. C-35] In the modified opinion, that quotation was deleted and replaced by the statement: "While the classification principle . . . might at first blush appear to be selective, Rotary's

own literature dispels this notion."[5] [J.S. App. C-1]

International petitioned for rehearing in the California Court of Appeal. That petition was rejected, as was International's petition for re-·iew in the California Supreme Court. [J.S. App. D] On June 23, 1986, the court of appeal granted a 30-day stay of execution of its judgment. On July 18, 1986, the court denied a further stay.

On July 25, 1986, (then) Justice Rehnquist also denied a stay. Thereafter, on September 16, 1986, pursuant to the judgment of the court of appeal

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[5]As a consequence, contrary to International's brief, the court of appeal did not say membership is selective.

[J.S. App. C-40-41], the trial court issued a judgment

> "mandating the Board of Directors of Rotary International and Rotary District 530 to reinstate . . . Duarte's charter . . . and permanently enjoin[ing them] from enforcing or attempting to enforce its male-only membership restriction against Rotary Club of Duarte." See attached appendix, pp. 1-2.

On November 3, 1986, this Court postponed jurisdiction and accepted the case for briefing and argument.

SUMMARY OF ARGUMENT

Large public service organizations like Rotary International are subject to the non-discrimination requirements of California's public accommodations law. Under that law, International may not exclude women from the advantages of membership in Rotary. This interpretation of the Unruh Act has been established by the California courts

and may not be challenged in this Court.

In the courts below, Duarte did not seek an order compelling any local Rotary Club to admit women as members. Instead, they sought to prevent International from requiring it to exclude women.[6] The judgment below is limited solely to the relief sought, leaving open the issue of whether local Rotary clubs in California must admit women.

International has submitted a brief based on the assumption that the lower court judgment applies the Unruh

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[6]Because this case was litigated in this context the record is wholly inadequate to consider whether the First Amendment would prevent the application of the Unruh Act to local Rotary clubs. For this reason, this Court should not exercise its certiorari jurisdiction if it finds, as it should, that no jurisdiction exists under 28 U.S.C. §1257(2). See §IV, infra.

Act to all local Rotary clubs in California, while ignoring the actual nature of the judgment below. Therefore, appellees have responded to this hypothetical case in the event this Court decides to consider that issue. However, the real issue is whether California may prevent International from imposing its discriminatory mandate on local Rotary clubs in California that choose to associate with women.

Rotary International is not the kind of organization that requires constitutional protection from state public accommodations laws. It is a huge operation with a great many business-like attributes. It is a significant force in communities across the United States and is a forum in which members receive significant business

and professional advantages. Indeed, the record in this case supports the conclusion that men join Rotary in large part to obtain these advantages, while also joining in the public service goals of Rotary.

International's male-only policy is a vestige of the turn of this century when Rotary was founded. There were few women community or business leaders in that era because of the stereotypical thinking about women and overt discrimination against them[7] which this Court has decried in many opinions. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973). International seeks to elevate its discriminatory practices

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[7]Even International's Board of Directors has recognized that the male-only rule has no place in a modern world. [Exh. F to Pigman deposition 50]

into an issue of fundamental constitutional principles of freedom of association. However, these claims trivialize those principles.

The state interests embodied in California's Unruh Act are indisputably compelling, as this Court unequivocally recognized in Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). The elimination of unjustified and discriminatory barriers to the full and equal participation of women in community life is a major objective of government at the local, state and national level. The Unruh Act is intended to be as sweeping an instrument to eradicate such barriers as the United States Constitution will allow. Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985). In our consti-

tutional scheme states retain the right to pursue a vision of equality in community life beyond that which is required by the Fourteenth Amendment. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

Moreover, California has pursued its compelling interest in gender equality in a content-neutral manner which is least disruptive of the rights of non-governmental organizations to operate as they choose. International has not been singled out for any reason other than its attempt to mandate gender discrimination in the Rotary Club of Duarte. The simple command of the Unruh Act is that the blanket exclusion of women from participation in large public service organizations cannot be sustained without a justification peculiar to the specific goals, struc-

ture and operation of the organization. In the case of Rotary, the court of appeal found no such justification. [J.S. App. C-37]

California's content-neutral interest in gender equality must be weighed against International's interest in freedom of association. The spectre presented by International, of big government forcing the entry of women into cloistered little Rotary clubs across the country, cannot be squared with reality or the record in this case.

There is no dispute that the members of local Rotary clubs have interests which trigger some degree of First Amendment scrutiny. However, International's desire to hold on to its blanket male-only rule implicates these interests only in the most atten-

uated manner. International itself, of course, has no meaningful First Amendment associational interests. It is an organization of local clubs and thus has no human members with such interests. Thus, International seeks to assert the associational interests of persons not involved in these proceedings.

Whether this Court evaluates the character of the asserted associational interests from the standpoint of the impersonal, theoretical interests International possesses or the hypothetical local Rotary club members International seeks to represent, the character of the asserted interests does not qualify for constitutional protection.

At no level of Rotary is the organization "intimate" in the sense described by the line of cases relied

upon by this Court in Roberts. There are no doubt groups of men or women in our society who seek an oasis from public life in the form of small private clubs, but Rotary is not built upon this premise. The whole concept of Rotary is to create in each community a growing cadre of community leaders who are active and involved in community and business life. Rotary clubs are not the intensely personal, private associations that provide the kind of interpersonal relationships found in family life. International's claim of a right of associational intimacy has as little merit as the similar claim by the Jaycees, rejected in Roberts.

The fact that local Rotary clubs appear to choose their members with "selectivity" does not modify this conclusion. First, there is no evidence in

the record that local Rotary clubs in fact choose their members in a selective manner. Each one chooses its members in its own way. Even the form of selectivity that International claims is involved in this case is not the same form of selectivity which suggests the kind of intimate relationships worthy of constitutional protection. There is a wide range of relationships which have a degree of intimacy. But constitutional protection for intimacy has been reserved for a small core of human relationships, primarily those resembling families. Roberts, 468 U.S. at 619. International's proposed expansion of this core would severely undermine the pursuit of equality in our society and should be rejected.

Similarly, International's assertion of expressive associational inter-

ests must be rejected. In this area, this is a much easier case than Roberts. The Jaycees take political positions and engage in public debate, actions prohibited by International's rules. Those rules do not allow the kind of expressive activities to which this Court has offered constitutional protection over the years. The purpose of Rotary is to perform public service in a non-political, non-ideological manner. Even if these activities contain a kernel of expression in a First Amendment sense, the character of these interests is clearly tangential to the core concerns of Rotary.

Moreover, the judgment below permitting the Rotary Club of Duarte to admit women as members barely touches upon, much less impairs, such expressive activities. Women are already per-

mitted to participate in a wide range of Rotary activities as non-members. It is difficult to perceive what the impact of the California Court of Appeal's judgment on International's expressive interests could possibly be. International's brief before this Court identifies no credible injury to such interests.

The cases and principles relied upon by International arise most often in the context of this Court offering essential constitutional protection for the disadvantaged and minorities. Although these are neutral principles applicable to all groups, the application of these constitutional principles to International would shield the assertion of power and privilege in a manner that is unwarranted and destructive of legitimate state author-

ity in pursuit of the goal of equality in our society.

International's vagueness and overbreadth arguments similarly trivialize those doctrines. The Unruh Act has been in existence for decades and there is an extensive body of case law interpreting it. International cannot seriously contend that organizations in California have no notice of its meaning. The Act is well within the range of clarity of language and meaning which raises no serious constitutional vagueness question.

Nor is the Unruh Act substantially overbroad. There is no evidence that the California courts have ever interpreted the Act to reach constitutionally protected activity. The California courts have carefully considered First Amendment defenses raised by Unruh Act

defendants and have insisted that the Act be interpreted to satisfy constitutional requirements. In these circumstances the "strong medicine" of the overbreadth doctrine should not be applied even if the Court finds, as it should not, that the Act might have some application to constitutionally protected activity.

ARGUMENT

I. INTERNATIONAL'S ASSOCIATIONAL INTERESTS DO NOT OVERRIDE CALIFORNIA'S PUBLIC ACCOMMODATIONS LAW.

International's freedom of association arguments have been answered by this Court in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Hishon v. King & Spalding, 467 U.S. 69 (1984). International fails to demonstrate how the court of appeal's judgment threatens anyone's associational interests. This Court has held that

when associational rights are claimed in defense of discrimination, the challenge must fail unless such a threat is shown. See, e.g., Runyon v. McCrary, 427 U.S. 160, 176 (1976); Railway Mail Association v. Corsi, 326 U.S. 88, 96 (1945).

In Roberts, a local chapter of the Jaycees admitted women. Thereafter, the national organization imposed sanctions upon it. Id. at 614. The United States Jaycees argued that Minnesota's attempt to impose its public accommodations act upon it violated its right to freedom of association. Id. at 615.

This Court rejected that argument, explaining that freedom of association exists in two forms: intimate association and expressive association. Whatever freedom of association interests were implicated by the application of

the Minnesota law to the Jaycees, they did not outweigh the state's compelling interest in protecting its women residents from discrimination.

A. International's Associational Activities Are Not of an Intimate Nature.

Relationships that are entitled to freedom of intimate association

> "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. Roberts at 620.

These criteria were drawn from the Court's cases which recognize a degree of constitutional sanctuary for the intimacy of family relationships and other relationships which are akin to family relationships. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (cohabitation with

relatives); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (raising and educating children). The intensity and "distinctly personal" aspects of such relationships were central to the scope of constitutional protection afforded to them.

The Jaycees were "outside of the category of relationships worthy of this kind of constitutional protection." Roberts at 620. International's characteristics place it, too, outside the scope of constitutional protection.

1. International is not small.

With a total membership in 1982 of 907,750 Rotarians in 19,788 local clubs, International is three times larger than the Jaycees, which had 295,000 members in 7,400 chapters. Roberts at 613.

International has a staff of 300, with offices in six countries. It operates a multi-million dollar business and maintains a sizeable publishing house.

A basic policy of International is to have the greatest possible growth. It has extension programs dedicated to forming new clubs. District governors are expected to try to organize a Rotary Club in every community and to fill as many of each club's classifications as possible. An organization this large and growth-oriented cannot claim the right to intimate association.

This Court has held that the size of an organization is one relevant factor in weighing associational rights. However, in certain situations, even members of a small and intimate group may have their associational rights

give way in the face of a more compelling state interest.

Thus, in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), six persons were living together in a single house large enough to accommodate them. A village ordinance prohibited more than two unrelated persons from living and cooking together in a household, although there was no such prohibition for persons related by blood, adoption or marriage. The Court sustained the ordinance on the ground that the zoning power of the city sufficiently overcame the individual rights of the occupants.

If groups as small and intimate as those in Belle Terre may have their

associational rights[8] overridden by a zoning ordinance, then certainly so large and impersonal an organization as International may not prevail in the face of a state's effort to eradicate sex discrimination.

2. International is not selective.

The mere fact that an organization is "selective" in its membership does not mean that a state may not prohibit it from discriminating in that selection. The question is whether the selectivity is substantially related to the objectives sought to be achieved. Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150 (1980). Thus,

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[8]The Court stated, at 7, that the right of association was not involved in the record before it. Even so, the Court's ruling impinged on the intimate relationship of the people involved who wanted to live together.

for example, an organization may be so selective that it is open only to endocrinologists. That does not mean it can therefore exclude black or female endocrinologists, especially if its goal is to include a broad spectrum of those in the profession.

The reason "selectivity" is a factor in cases such as this is that the concept helps in determining whether the organization is "truly private."[9] As the court explained in United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 412, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983), important in determining whether an organization is "private,"

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[9]This phrase is from this Court's opinion in Tillman v. Wheaton-Haven Recreation Association, Inc., 410 U.S. 431, 439 (1973)

is that the "membership is determined by subjective, not objective criteria."

International accepts new clubs on purely objective criteria. The essential qualification for a club to join International is that it be in a community with at least 40 occupational categories, and have as members at least 20 men from different businesses or professions. [Exh. C to Pigman deposition, Extension Manual; J.S. App. G-20-22] The decision to admit a new club is effectively made by only one person, the general secretary. The members of International have no say in that decision.

The admission of individual members is done by the local clubs, not by International, which does no selecting at all.

3. International is not secluded from others in the community.

A club is entitled to associational protection against a civil rights statute only if it is "truly private." Tillman v. Wheaton-Haven Recreation Association, Inc., supra. International is simply not "truly private" within the meaning of the constitutional protection for intimacy.

International puts itself forward, actively, into community affairs. Its clubs are urged to promote the Rotary name and activities at every opportunity, seek unlimited members from the local press, have non-Rotarians attend meetings and send speakers about Rotary to outside groups.

At international or regional meetings held in convention halls, International expects that the rental and

other expenses will be paid by "the city government, or the chamber of commerce, tourist association or a similar group." [J.A. 46] With Rotary signs at the entrance to cities and towns all over the world, International is dedicated to calling public attention to itself. These are not marks of a "private," secluded, non-business organization.

Even an organization as secluded as a law firm partnership may not use its associational rights to excuse its compliance with an anti-discrimination law. In Hishon v. King & Spalding, 467 U.S. 69 (1984), the question was whether the federal law against employment discrimination, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e et seq.), prohibited a law firm from discriminating in its partnership deci-

sions. This Court held that law firms are not beyond the reach of Title VII, repeating its earlier holding that

> "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." Hishon at 78, quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973).

B. International's Associational Activities Are Not of an Expressive Nature.

This Court should not consider the issue of expressive association since it was not raised below. Furthermore, International has not explained in what expressive associational activities it is engaged.

In Roberts, this Court explained the freedom of expressive association as

> "a right to associate for the purpose of engaging in those

> activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion." 468 U.S. at 618.

Thus freedom of association is a derivative right, applicable when it aids in the exercise of an express First Amendment right. No express First Amendment right is involved here.

Even when a First Amendment right is involved, freedom of association does not necessarily override a public accommodations law. In Roberts, this Court held that the Jaycees' right to expressive association did not override the Minnesota law. The Jaycees, however, does engage in public expression. It has taken stands on the draft, school funding, the Vietnam War and pornography, among other issues. United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983).

As for Rotary International, there is no possible issue of infringement on its exercise of free speech or religion, since its policy specifically prohibits it or its clubs from taking any political or religious positions. [Manual 161] Thus this case raises no issue of infringement of expressive rights.

In its struggle to distinguish itself from the Jaycees, International notes that women were invited to participate in the Jaycees' activities, while on the other hand, Rotary has no official women's affiliates. [App. br. 20]

However, women do participate in Rotary activities. There are organizations of women auxiliary to local clubs. To be sure, "formal official, legal recognition" [J.A. 68] is not

given to these organizations, but their presence and assistance is encouraged and commended by International's board. Members of these committees are authorized to wear the Rotary lapel button. There is also no ban on women attending meetings or being speakers.

There are also women and girls in International's youth and young adult clubs, called Interact (for 14 to 18 year-olds) and Rotaract (18 to 28). Whatever might be the extent of women's participation in Rotary, in the Jaycees, as associate members, they accounted for only 2% of the membership. Roberts at 613.[10]

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[10]While International tries to show how dissimilar it is from the Jaycees, it also argues how much like Kiwanis it is. [App. br. 21] That is because of this Court's passing reference to "the Kiwanis Club" in Roberts. At 630. That reference was based on an illustrative

International's argument that Duarte bears the burden of justifying the application of the Unruh Act to International [app. br. 46] is not well

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remark by the Minnesota Supreme Court as to "the Kiwanis International Organization." United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). Neither in that court, in the federal courts, 534 F. Supp. at 773 and 709 F. 2d at 1577, nor in this Court was there sufficient evidence upon which to judge the real nature of Kiwanis. The evidence consisted merely of Kiwanis International's constitution and by-laws, a roster of the Minneapolis club members, and a thumbnail sketch of the International from 1 Gale, Encyclopedia of Associations (15th ed. 1980) [Roberts, appellants' brief 27] The most that can be said, as this Court did, is that there exists "a formal procedure for choosing members on the basis of specific and selective criteria." There is no evidence as to whether the procedure is actually followed. [See cases cited infra.] Nor is there evidence of whether there are any of the other considerations mentioned by this Court in Roberts, at 620, which would guide a court in deciding which rights--the anti-discrimination or the associational--should prevail.

taken. The one who discriminates bears the burden of proving the justification for the discrimination. As this Court said in Roberts, "The Jaycees have failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." 468 U.S. at 626. Similarly, in Hishon, "[The law firm] has not shown how its ability to fulfill [the duties of a lawyer] would be inhibited by a requirement that it consider petitioner for partnership on her merits." 467 U.S. at 626. This confirmed what lower courts had held. See, e.g., Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); Brown v. Loudon Golf & Country Club, 573 F. Supp. 399, 402 (E.D. Va. 1983)

International asserts that Rotary would be severely injured if women were admitted [app. br. 26, 34], but it does

not explain why or how Rotary would be injured. There seems to be a silent assumption that women are so different from men that their very presence will contaminate the organization. It is just such assumptions that this Court refused to accept in Roberts. See, e.g., 468 U.S. at 627-28.

The admission of women would not damage International. The very purpose of the Jaycees was the development of opportunities for young men. 468 U.S. at 612-13. Yet this Court held that the presence of women would not interfere with that purpose. Id. at 627. The object of Rotary International is public service. The presence of women obviously would not interfere with that purpose.

International points to NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451 (1958), to argue that it is entitled

to protection for its objectives. [App. br. 27] Of course it is. Again, its objective is public service and the presence of women will not interfere. Even its secondary objective of fellowship will not be adversely affected by the presence of women, especially since women are already present in any case. (See discussion at IB.)

That point was made in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). Men were not allowed to enroll for credit in the nursing school of a university founded for the purpose of "the moral and intellectual advancement of the girls of the state." At 720. They were, however, allowed to audit classes. This Court rejected the university's contention that its gender-based discrimination was substantially and directly related to its objective,

saying: "To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men." At 730.

The real reason for International's exclusion of women seems to be that the organization started at a time when few women were in business. As Mr. Pigman explained, it became "part of the tradition and practice." [J.S. App. G-51] That is a flimsy basis upon which to deny women today the benefits of the public accommodations law.

The only concrete injury International suggests is the potential harm to its worldwide operation, but even then it does not say how its operation would be harmed. In some of the countries that have Rotary Clubs, women members might

not be accepted. [App. br. 11, 16, 34] But International fails to explain how, if some California clubs admit women, other countries would be impacted. All the admission of women means is that visiting foreigners might find women at Rotary meetings. But they already do, since women attend as guests.

Attitudes in other cultures were at issue in Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981). The Court rejected the argument that a company could refuse to hire a woman as director of international operations because South American customers would not do business with a woman. Even though "the United States cannot impose standards of non-discriminatory conduct on other nations," no foreign nation can compel the non-enforcement of Title VII of the Civil Rights Act of 1964. Id. at 1277.

International is proud of its ability to operate worldwide because of its concern for diverse cultures. [App. br. 11] California residents are entitled to similar consideration.

C. California Has a Compelling Interest in Eliminating Sex Discrimination.

As this Court emphasized in Roberts, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." 468 U.S. at 626. The types of "goods" (e.g., commercial programs and benefits, and leadership skills), "privileges" and "advantages" (e.g., business contacts) offered by participation in the Jaycees are also provided by participation in Rotary.

International attempts to distinguish itself by stating that the Minnesota court relied on the fact that the

Jaycees "sells goods and extends privileges in exchange for annual membership dues."[11] [App. br. 15, 28, 29] But, in fact, International does the same thing. As the Conference of Private Organizations said in its amicus curiae brief in Roberts,

> "The U.S. Jaycees is far from unique in having a large nationwide membership, which it vigorously seeks to expand . . . . The membership recruiting of the U.S. Jaycees is not unlike the practices or [sic] other restricted-class membership associations, such as national fraternal and service organizations." [At 11-12]

International is one of those service organizations. It, too, "sells" its memberships through its constant emphasis on growth and publicity.

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[11]This Court in Roberts, while noting that comment, at 616, does not rely on it.

International argues that Roberts does not govern because of the differences between the Jaycees and Rotary. In fact, the two organizations are remarkably similar. Both are non-profit membership corporations with educational and charitable purposes. Roberts at 612-13. [J.A. 35] Like the Jaycees, Rotarians join through local chapters, pay an initiation fee and annual dues, are entitled to participate in local, district (instead of state), regional and national activities. Rotary International, like the Jaycees, strives for membership growth and keeps a high public profile. The national headquarters of both organizations employs a staff to develop materials for local chapters to enhance individual development, community development and members' management skills. Both have

various products available to members. See Roberts at 613-14.

International argues that "Rotary clubs are not engaged in the commercial distribution of publicly available goods and services." [App. br. 26] In its brief in Roberts it said "The Jaycees do not exist for the purpose of providing goods and services to the general public." [At 17] The point was not significant in Roberts and should not be significant here.

In fact, many decisions have made it clear that in order for an organization to be subject to public accommodations statutes it is not necessary that it be engaged in the commercial distribution of publicly available goods and services. See, e.g., Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973)(a community swim-

ming pool); United States v. Slidell Youth Football Association, 387 F. Supp. 474 (E.D. La. 1974); National Organization for Women v. Little League Baseball, 127 N.J. Super. 522, 318 A.2d 33 (1974); United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1981)(boating). The question is not whether an organization is commercial, but whether it is of that private nature which will enable it to overcome a state's compelling interest in protecting against sex discrimination.

States have broad authority to pursue their own vision of equality and civil liberties, subject only to a showing that countervailing constitutional interests are seriously threatened. Pruneyard Shopping Center v.

Robins, 447 U.S. 74 (1980)(California may grant broader rights to engage in First Amendment activity in shopping centers than required by the First Amendment).

The Unruh Act effectuates California's century-old public policy of ensuring equal access for all members of the community to important institutions in public life. California courts have consistently underscored the importance of eradicating gender discrimination. See Koire v. Metro Car Wash, 40 Cal. 3d 24, 34, 707 P.2d 195, 219 Cal. Rptr. 133 (1985) ("men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment"); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (legislative classifications based on gender are suspect for pur-

poses of equal protection analysis); Pines v. Tomson, 160 Cal. App. 3d 370, 392, 206 Cal. Rptr. 866 (1984)("California's interest in eradicating discrimination on the basis of . . . sex is unquestionably 'compelling,'" citing Roberts, 468 U.S. at 623). Similar interests underlie the Unruh Act's prohibition against the exclusion of women from all but "truly private" groups.

The Unruh Act has implemented the state's policy of gender equality in the manner least disruptive of the internal operations of International. It does not require that all women or any given woman be admitted to Rotary, but it prohibits the blanket exclusion of women from participation.

According to this Court in Roberts:

> "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." 468 U.S. at 623.

The rationale for the state's compelling interest is explained in Roberts:

> "By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms. [Discrimination] both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.
>
> . . . .
>
> "That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." Roberts at 625.

One of the state's interests is in seeing that women do not suffer from the loss of business opportunities. People join business and professional associations to advance their careers.[12] So, too, they join Rotary to advance their careers. International claims this is not so. That claim does not stand up to scrutiny.

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[12]International criticizes the court of appeal for not having referred to the women plaintiffs' acknowledgment "that they did not feel that they had been impeded in their pursuit of their business and/or professional careers or financially damaged by any actions of Rotary International." [App. br. 30] The court of appeal properly ignored the point because it was irrelevant. The women plaintiffs were not impeded in the pursuit of their careers since they were admitted to the Duarte club. As for their not having joined for the express purpose of promoting their careers, that does not mean it was not an unstated purpose, as it undoubtedly is for most Rotarians.

The evidence substantiates that Rotary membership is an important business advantage. Club members must consider it to be, since they deduct their dues as business expenses from their income taxes or have the dues paid by their businesses. Even International's witness, a former cemeterian, had his dues paid by his company when he was employed. A former treasurer of the Bakersfield Rotary Club testified that 95-96% of the local members' dues were paid by their companies.

The IRS has allowed such deductions [J.S. App. C-25], thereby recognizing the primary business nature of the organization. The Internal Revenue Code provides that social club dues are deductible if the club is used primarily for business and the use is directly related to the conduct of the business.

26 U.S.C. §274(a)(2). Either many Rotarians are breaking the law or the claim that membership is not for business purposes is a hypocritical one.

International's general secretary insists that community service is the only reason for the Rotary Clubs' existence. [J.S. App. G-33-34] If that were true, it is unclear why membership should be limited to business and professional people. Surely a laborer can work in charitable activities. Rotary, by limiting membership to business and professional leaders, provides an opportunity for its members to make the right contacts.

The limit of one member per occupation serves to protect the classification holder's right to maintain his monopoly over beneficial contacts with members in other businesses. The excep-

tions for Rotarians who come from other clubs or a second person in each classification highlight the rationale for the rule. Those people may join, but only if the club's holder of the classification approves. [J.A. 86]

Even International acknowledges that Rotary provides important contacts. The Rotary Vocational Service handbook headlines: "In modern times, it is only by the power of association that men of any calling exercise their influence in the community." [Exh. B to Pigman deposition, vol. 3, Vocational Service 33 (see J.S. App. G-9-11)] That heading is followed by a discussion of ethical business practices:

> "Daily relations with business or professional associates can provide every Rotarian with opportunities to demonstrate personally to his customers, clients, suppliers, competitors, or colleagues that the

> ideal of Service can help form a truly solid basis upon which to achieve business and professional success." [J.A. 92]

Another way of stating it is in the well-known axiom of the business world: "who you know is at least as important as what you know." Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. C.R.C.L. L. Rev. 321, 322 (1983).[13]

Although many of the business benefits of Rotary are through personal contacts, there is direct help as well. Local clubs are expected to establish

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[13] See also, Willard, "Roberts v. United States Jaycees and the Affirmation of State Authority to Prohibit Sex Discrimination in Public Accommodations: Distinguishing 'Private' Activity, the Exercise of Expressive Association and the Practice of Discrimination," 38 Rutgers L. Rev. 341, 374-75 (1986); Note, 33 U. Kan. L. Rev. 771, 787 (1985), and authorities cited.

committees of members in different classifications who will give "confidential business advice and assistance to Rotarians who may request such help." [J.A. 40] International encourages clubs to provide clinics for discussing economic problems. Through Rotary publications and vocational programs members study business problems and their solutions.

Another service International provides for its members is business relations conferences. At these conferences

> "[t]he Rotarian learns management techniques that help improve his own business or professional skills. He receives the inspiration of discussing business problems with experts in his own or related fields. And he enjoys the fellowship of sharing ideas with fellow Rotarians." [J.A. 14]

There are obviously business advantages to Rotary membership and Califor-

nia women are being injured by their exclusion.[14] This Court should look to the reality, not to International's denials of its business-relatedness. As was said in Watts v. Indiana, 338 U.S. 49, 52 (1949), "there comes a point where this Court should not be ignorant as judges of what we know as men."

In United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981), the Minnesota Supreme Court found that membership in community-wide, service-oriented, business-related organiza-

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[14]There is extensive literature showing the political, economic and cultural harm to women by exclusion from organizations such as Rotary. See, e.g., "Avner & Bacharach, Let's Make a Deal--When Private Means Business," N.Y. St. B.J., Oct. 1985, p. 12; Bartlette, Poulton, Callahan, Somers, "What's Holding Women Back," Mgmt. Wkly., Nov. 8, 1982; Ginsburg, "Women as Full Members of the Club: An Evolving American Ideal," 6 Hum. Rts. 1

tions provides enhanced leadership experience and an advantage in making business contacts. Membership in Rotary International does the same. Or as Rotary states it in its official motto: "He Profits Most Who Serves Best." [J.A. 69]

II. IF THE LOCAL CLUBS WERE COVERED BY THE UNRUH ACT THEIR ASSOCIATIONAL INTERESTS WOULD NOT BE VIOLATED.

Whether the local clubs are covered by the Unruh Act is not at issue in this case. However, out of an abundance of caution, we discuss the matter. Were the judgment viewed as requiring local clubs to admit women, such a judgment would

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(1977); Jost, "Judges Make Private Clubs a Public Wrong," L.A. Dly. J., Sept. 22, 1986, p. 2, col. 4; Schefrau, "Welcome to the Club (No Women Need Apply)," Women & Found./Corp. Philanthropy (1981).

not violate the clubs' constitutionally-protected associational rights.

"A fundamental principle underlying the administration of Rotary International is the substantial autonomy of the member Rotary Clubs." [J.A. 35] However, International does suggest guidelines, which provide a limited basis upon which to consider the associational rights of the clubs, under this Court's holding in Roberts.

In Roberts, at 620, this Court mentioned a number of factors--"size, purpose, policies, selectivity, congeniality"--which aid in determining whether associational interests can preclude application of anti-discrimination laws. Just as those factors did not lead to the conclusion that the Jaycees clubs may discriminate, so too, Rotary clubs may not discriminate.

International requires that there be at least 20 men in a community willing to be a club. Moreover, the club must be in an area where there are at least 40 classifications, which means at least 40 prospective members. There is no maximum number who can be in the club, since continual growth is an object of every local club. The goal is to have every business, profession and institution in the community represented. Yet, "[m]ost private clubs have limited membership." Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968).

Some clubs have over 900 members, more than twice the size of the clubs in Roberts. 468 U.S. at 621. The average club size is 46 as opposed to the Jaycees' average of 40. 468 U.S. at 613. There is a high turnover rate, between 10 and 20% a year. [R.T. 65]

The clubs that remain at or drop below their founding number of 20 are unsuccessful, rather than "intimate" or "private."

There is no evidence that the clubs are selective. International argues that they are, detailing the procedure for admitting members into local clubs as outlined in the recommended club by-laws. [App. br. 7-8] It then concludes that the "foregoing undisputed facts led the trial court to find that Rotary Clubs are highly selective in their membership." [App. br. 9] But the procedures International describes are nothing more than recommendations; the local clubs are not required to follow them. In fact, International's general secretary testified that "[t]he method of elec-

ting a member is in the province of the local Rotary Club." [J.S. App. G-18]

International's statement of facts makes it sound as though all clubs use the described election process. For example, International claims that "[m]embership in Rotary is by invitation only." [App. br. 7] It cites the Pigman deposition [J.S. App. G-49] and Focus on Rotary [Exh. B to Pigman deposition, vol. 1] to support its claim. But these statements are contradicted by the Manual of Procedure, which Mr. Pigman, the general secretary of Rotary International, said is "an authoritative statement of Rotary practices and principles." [J.S. App. G-7] According to the Manual, local clubs are allowed to adopt their own by-laws. [Manual 315; see also J.A. 88] Whether they adopt the recommended

method and how they arrive at the so-called one-person-per-business-or-profession rule is for them to decide.[15] [J.S. App. G-18]

Even if these procedures were requirements rather than recommendations, they would not necessarily qualify the local clubs for an exemption from the public accommodations law. Decisions under the federal public accommodations law, involving blacks, have held that even clubs with formal membership requirements are subject to

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[15]International's system does not limit clubs to one member per classification. There can be sub-classifications, such as criminal lawyer, corporate lawyer, probate lawyer, etc. [J.A. 87] And while there may be no more than two active members in each classification [J.A. 86], there may be an unlimited number of senior active, past service, press, clergy and diplomatic corps members. [J.A. 39; Manual 249-50] Thus, the so-called one-man classification system is not that at all.

the law. See Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980)(two-member sponsorship, membership committee approval, board approval); Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968) (substantial annual dues, membership committee, good moral character); Brown v. Loudoun Golf & Country Club, Inc., 573 F. Supp. 399 (E.D. Va. 1983)(good moral character, two-member sponsorship, membership ceiling, substantial initiation fee, board approval); United States v. Trustees of the Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis. 1979)(two-member sponsorship, investigating committee, board approval, member blackball, good moral character, belief in God).

The courts in these cases considered the significant factor to be not what the written procedures are, but

whether they are actually used. Brown at 403; Eagles at 1175. The burden is on the club to show that its written procedures actually result in membership selectivity. Nesmith at 101; Brown at 403; Eagles at 1176. International has provided no evidence as to how the clubs actually select members.

International's purpose is that the membership be "inclusive, not exclusive." [J.A. 84] That is a "public," not a "private" characteristic.

International speaks of the local Rotary Club as "a body of men who are knit together in bonds of personal friendship and service." [App. br. 10] But any intimacy this suggests is impossible because of International's rule that all clubs must welcome visiting Rotarians, strangers whom they have never met. [J.A. 85] Once a club has

accepted a member, International and every other local club must accept him.

Local clubs are not secluded. The formation of a new club is announced in the media. All local clubs are expected to publicize their activities. They send speakers out to community groups to talk about Rotary and they proclaim their presence to the world by placing signs at the entrances of their cities. Further, clubs are encouraged to obtain full representation from all the local press in the community.[16]

There is nothing private nor secluded about Rotary club meetings. They are supposed to have in attendance employees, competitors, customers and

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[16]This rule conflicts with the rule prohibiting the admission of women, but International apparently does not contemplate there being women reporters.

salesmen of the members, students and others. Joint meetings are held with other service clubs and community services organizations. Appropriate measures are supposed to be taken to have the weekly meetings reported in the press. The emphasis is on maintaining a high profile.

Under International's own rules, the clubs are not "secluded." "Every Rotary club must have its windows and doors open to the whole world." [J.A. 85]

Strangely, International cites Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1974) for guidance on the interpretation of a "private club" exemption. [App. br. 25] But the factors in Cornelius lead to the conclusion that Rotary clubs are not private.

> "To have their privacy protected, clubs must function as extensions of members' homes and not as extensions of their businesses." 382 F. Supp. at 1204.

Rotary clubs are extensions of their members' businesses, not their homes.[17]

III. THE UNRUH ACT IS NEITHER VAGUE NOR OVERBROAD.

International argues that the Unruh Act is unconstitutionally vague and overbroad. Not only is neither true, but this Court should not consider the argument since it was not timely raised.

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[17]Moose Lodge, No. 107 v. Irvis, 407 U.S. 163 (1972), also, does not assist International. That case was decided on a state action rationale, not on associational grounds. Further, when the very same Moose Lodge was challenged under Pennsylvania's public accommodations act, it was held to be covered. Commonwealth Human Relations Commission v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972), appeal dismissed for want of a substantial federal question. 409 U.S. 1052 (1972).

A. International's Vagueness and Overbreadth Arguments Were Not Timely Presented to the California Courts.

International did not raise the issues of vagueness or overbreadth in its briefs in the trial court [C.T. 218, 294] nor in the court of appeal.

In its Petition for Rehearing before the court of appeal and in its Petition for Review before the California Supreme Court, both of which were denied without opinion, International made an argument based on "uncertainty." But this was too late, both under California law, Cain v. French, 25 Cal. App. 499, 502, 144 P. 302 (1914); Rule 29(b)(1), California Rules of Court, and in this Court. See Radio WOW v. Johnson, 326 U.S. 120, 128 (1945); Godchaux Co. v. Estopinal, 251 U.S. 179, 181 (1919). This Court ought not hear a matter that

was not properly presented to the courts below. [Id.]

In its brief, at 36-37, International sets forth a paragraph from its brief in the court of appeal and claims that it raised the vagueness and overbreadth issue before that court. That single paragraph was in connection with International's argument that the Unruh Act could be applied only to an organization "where such memberships comprise a vehicle for public sale of goods, services or commercial advantages." [International's brief before the court of appeal, p. 23] That was not an adequate presentation of the point to the lower court for decision.

B. The Unruh Act Is Not Unconstitutionally Vague.

In Roberts this Court noted that the

> "void for vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" 468 U.S. at 629, citing Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Unruh Act is not vague in any constitutional sense. It prohibits all "arbitrary" discrimination in "business establishments," as those terms have been interpreted in numerous decisions over the past decades. Persons of common intelligence, and particularly large organizations with access to legal counsel, should not find the meaning and application of the Unruh Act difficult to understand. International's vagueness argument should receive the same treat-

ment received by the Jaycees' vagueness argument in Roberts. 468 U.S. at 629-30.

1. International has no standing to raise its vagueness argument.

International has no standing to challenge the Unruh Act on vagueness grounds, as the Act clearly applies to gender discrimination. The Act says, in plain English, that "all persons . . . of this state . . . no matter what their sex . . . are entitled to the full and equal accommodations, advantages, etc." As this Court emphasized in Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495 (1982):

> "A [person] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

This rule must be applied with caution when First Amendment rights are involved, but there is no basis for any

conclusion that the Unruh Act has any significant adverse impact on the exercise of First Amendment freedoms.[18] See §I, supra.

2. The term "arbitrary discrimination" has a clear meaning under the Act.

The critical point about the concept of "arbitrariness" within the meaning of the Unruh Act is that blanket exclusionary policies of entire categories of persons will seldom be permitted. Marina Point v. Wolfson, 30 Cal. 3d

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[18]International's "choice of law" contention hardly merits comment. The court below was correct in not considering Order of Travelers v. Wolfe, 331 U.S. 586 (1947), to be controlling. It isn't. See Clay v. Sun Insurance Office, Ltd., 377 U.S. 179, 183 (1964), limiting the case to its facts, and Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 558 (2d Cir. 1962), considering, even before Clay, that under this Court's decision in Richards v. United States, 369 U.S. 1, 15 (1962), the case no longer represented the law.

721, 738-40, 640 P.2d 115, 180 Cal. Rptr. 496 (1982). Absent a compelling specific justification for the blanket exclusion of a class of persons, entities covered by the Unruh Act may exclude people based only on a reasonable individualized basis.

In Marina Point, for example, this concept was applied to prohibit the blanket exclusion of children from a housing complex when there was no claim that there were grounds to exclude the particular child involved. In Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985), the exclusion of all girls from local recreational facilities was found to be arbitrary.

In California, even true generalizations about a class may not be used to justify the exclusion of a class

member to whom the generalization does not apply. Id. at 740, citing Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (pension system based on actuarial fact that women live longer than men invalidated because it might not be true of an individual woman). All people in California must be treated as individuals on their own merits by "business establishments of every kind whatsoever."

International asserts that the Unruh Act's prohibition of "arbitrary" discrimination "obliterates all freedom of association." [App. br. 46 (emphasis in original)] There is simply no support in California law for this absurd statement. If an association is "strictly private" the Act places no limitation at all on the association or its members. If the association is covered by

the Act, it may still adopt certain kinds of discriminatory policies if an adequate justification exists.[19] The basic test, set forth in In re Cox, 3 Cal. 3d at 212, is whether the exclusion is "rationally related to the services and facilities performed." In Cox, the California Supreme Court decided that excluding the companion of a person with long hair and unconventional dress from public accommodations could not meet this test. See also Orloff v. Los Ange-

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[19]Applying this basic principle, California courts have permitted certain forms of discrimination based upon the reasonableness of the justifications for discrimination under the circumstances. See, e.g., Ross v. Forest Lawn Memorial Park, 153 Cal. App. 3d 988, 203 Cal. Rptr. 468 (1984)("punk rockers" excluded from a private funeral at the request of the mother of the deceased); Wynn v. Monterey Club, 111 Cal. App. 3d 789, 796-98, 168 Cal. Rptr. 878 (1980)(compulsive gambler excluded from a gambling club).

les Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951)(person with a reputation as a man of immoral character cannot be excluded from a race track); Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969 (1951)(homosexuals cannot be excluded from a bar and restaurant).

There is nothing in the Act which prohibits the use of Rotary's "classification principle" to create an organization of diverse community leaders. The rationale for this principle is not "arbitrary." However, the policies of groups covered by the Act cannot be based on the blanket exclusion of women. Any given woman may be excluded based on the criteria established by the Rotary Club in question.

Although the basic prohibition in the Unruh Act against arbitrary discrimination may be difficult to apply in

some situations, such difficulties do not render the Unruh Act unconstitutionally vague. There is a substantial body of case law which shows the application of the Act in any given situation. See, e.g., Isbister v. Boys' Club of Santa Cruz, supra; Marina Point v. Wolfson, supra; In re Cox, supra.[20] International's real complaint is not that it can-

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[20]International makes an argument that the Act is vague because the exclusion of homosexuals is covered and the exclusion of the physically handicapped is not. [App. br. 41] However, the citation to Marsh v. Edwards Theatres Circuit, Inc., 64 Cal. App. 3d 881, 134 Cal. Rptr. 844 (1976), is disingenuous. The decision in Marsh was based on the fact that the California legislature had enacted legislation specifically addressing the rights of the handicapped which controlled and that the owner of a movie theater could not be compelled to make structural changes to his building which had been built in compliance with existing law at the time of its construction. Moreover, Marsh cannot be read as a blanket exclusion of physically handicapped persons from the coverage of the Unruh Act in other contexts.

not ascertain the application of the Act, but that the Unruh Act applies to it.

3. The term "business establishment" has a clear meaning under the Act and in case law.

Similarly, the Unruh Act's application to "business establishments of every kind whatsoever" does not render the Act unconstitutionally vague.[21] California has chosen to eliminate arbitrary discrimination in every form of organization to which the Unruh Act can

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[21]The California legislature specifically broadened the scope of the Act in response to court decisions which adopted an unduly restrictive view of its scope. In re Cox, supra; Isbister v. Boys' Club of Santa Cruz, Inc., supra.

reasonably and constitutionally be applied.[22]

The California courts have clearly expressed their willingness to apply the factors identified in Roberts to circumscribe the scope of the Act to avoid infringing on countervailing constitutional rights. They have recognized that the Unruh Act does not apply to "strictly private" clubs or institutions. Curran at 730-32 (emphasis in original). "We therefore conclude that the concept of organizational membership per se cannot place an entity outside the scope of the Unruh Act unless it is

[22]It should be noted that the trial judge on remand in Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), appeal dismissed 468 U.S. 1205 (1984) ruled that the scope of the Unruh Act was defined by the protections afforded for freedom of association under the Constitution. [See attached appendix, pp. 7-8.]

shown that the organization is truly private." Id. at 732. Thus, the California courts adhere to the teaching of this Court in Tillman, 410 U.S. at 439.

Although International contends that it should fall within this exemption--that it is "truly private--it can hardly take the position that it does not have reasonable notice that the Unruh Act applies to it. The California courts have held that large organizations, like the Boy Scouts, Curran v. Mount Diablo Council of Boy Scouts of America, supra, and Boys' Clubs, Isbister v. Boys' Club of Santa Cruz, Inc., supra, which play a prominent and influential role in the public life of our communities are covered by the term "business establishments" in the Unruh Act. That meaning is plain. These California precedents establish a constitu-

tional sanctuary for "truly private" associations--but not for large public service institutions which play a prominent and influential role in the life of the community.

C. The Unruh Act Is Not Unconstitutionally Overbroad.

International's overbreadth argument is similarly defective. The Unruh Act has never been applied to "strictly private" groups or to activities which qualify for protection under the First Amendment. A brief review of the cases International finds most offensive to its notion of freedom of association demonstrates this fact.

In O'Connor v. Village Green Owners Association, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983), the California Supreme Court held that a non-profit homeowners' association was

subject to the Unruh Act. Central to this decision was the court's view that the association operated very much like a profit-making business establishment in its management of the 629-unit condominium project which was the subject of the litigation. Although members of the court disagreed about the intended scope of the Unruh Act in these circumstances, no member of the court believed that First Amendment freedoms were in any way involved in the case.

Similarly, in Isbister, the First Amendment interests implicated by the operation of the recreational facilities at issue were minimal. The Boys' Club, as is true here, did not select its members on the basis of personal, cultural or religious affinity as a truly private club might do. Id. at 81. The only difference between the facilities

at issue in Isbister and recreational facilities run by a profit-making group was the non-commercial purpose animating the organizers and directors of the operation. Under the Unruh Act, as in Roberts, a "business establishment" need not have a profit-making motive.[23]

In Isbister, the California Supreme Court carefully evaluated the nature of the Boys' Club's First Amend-

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[23] International's use of Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970), to suggest that the Unruh Act is limited to discrimination "in the course of furnishing goods, services or facilities to [an entity's] clients, patrons or customers" is odd. [App. br. 46]. This is clearly not the test that the California courts employ. Nor is it a test required by the constitution. Roberts, 468 U.S. at 625. See §IC, supra. Moreover, the primary point in Alcorn was that the Unruh Act did not apply to employment discrimination because the California legislature had enacted comprehensive legislation in that area. 2 Cal. 3d. at 500.

ment interests under the criteria established in Roberts, and held that the Boys' Club could be regulated under the principles of that case. 40 Cal. 3d at 85. The court of appeal made a similar analysis in this case. [J.S. App. C-33-38] See also, Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d at 729-32.

The California Supreme Court in Isbister further demonstrated its concern for safeguarding any countervailing First Amendment interests by indicating that "[w]e reserve judgment as to whether any organization or entity serving a substantial segment of the public on a non-selective basis is a 'business establishment' within the Act's meaning." Id. at 81, n.8. Thus, the Court has expressly reserved judgment on the California Court of Appeal's decision in

Curran, a case relied heavily upon by International.[24]

The Unruh Act does not regulate based upon the content of First Amendment expression. Indeed, as discussed in Section I B, supra, there is little, if any, "expression" involved in the activities of Rotary.

The Act is content-neutral in the scope of its coverage and in the acts it prohibits. The fact that the Act has a "bias" against any restriction of public access in "business establishments" [app. br. 47] is true but it is not evidence of a lack of neutrality for First

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[24]It should be noted that the claims in the Curran case involved allegations of substantial business activities on the part of the Boy Scouts of America. 147 Cal. App. 3d at 718-19. In any event, the California courts have yet to resolve the First Amendment claims asserted by the Boy Scouts in that case.

Amendment purposes. The Act is "biased" against sex discrimination and that "bias" is firmly established state policy in California.[25]

International's arguments express a strong dissatisfaction with the public policy of California. However, these arguments are not a serious attempt to apply the "overbreadth" precedents of this Court. Like the vagueness doctrine, the overbreadth doctrine is concerned with the chilling effect of statutes which threaten protected speech. This case involves no regulation of speech at

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[25]Nor does the unavailability of fees to successful Unruh Act defendants implicate any First Amendment interests, as International contends. [App. br. 42, 47]. There is no constitutional principle that requires civil rights plaintiffs and defendants to be treated identically with respect to fee awards. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

all. The case law under the Unruh Act does not demonstrate that the Act has been applied to conduct or expression protected by the First Amendment. There is no reason to believe that California courts will suddenly fail to consider First Amendment interests.

This Court has recognized that using the overbreadth doctrine is "manifestly, strong medicine" which should be "employed by the Court sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); see also, New York v. Ferber, 458 U.S. 747, 769 (1982). The doctrine has ordinarily been applied in the context of criminal statutes which by their terms reach, and thus "chill," protected expression. Thornhill v. Alabama, 310 U.S. 88 (1940).

Few state anti-discrimination statutes would survive scrutiny under the overbreadth test International proposes. Every application of such statutes involves a potential claim that a defendant is being compelled to come in contact with persons he would prefer to avoid. The "strong medicine" of the overbreadth doctrine is too potent to apply to the competing constitutional interests in this area.

The crucial question for overbreadth purposes is whether a statute reaches a substantial amount of constitutionally protected conduct. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-95 (1982); Broadrick v. Oklahoma, 413 U.S. at 613. As demonstrated above, the Unruh Act does not. Indeed, there is no basis to believe the Act reaches any protected activi-

ties. As this Court emphasized in Broadrick, at 615-16:

> [W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that [the statute in question] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

The California courts have shown a willingness to construe the Unruh Act to avoid any constitutional difficulties. Even were it possible to hypothesize potentially unconstitutional applications of the Act, the same could be said for virtually any public accommodations law. Therefore, there is no basis for finding the Act unconstitutionally overbroad.

IV. CERTIORARI SHOULD NOT BE GRANTED.

There are no grounds for this Court to exercise its discretion by way of certiorari. If it does, it should deny the writ.

First, this case does not raise novel issues. Rather, it is controlled by the decision in Roberts v. United States Jaycees, 468 U.S. 609 (1984). See also Hishon v. King & Spalding, 467 U.S. 69 (1984).

Second, there is no conflict among the lower courts on the issues presented here.

Third, the record below does not support the questions International raises. International would like this Court to decide whether an asserted claim of freedom of association outweighs an individual's right to be free from discrimination under a state pub-

lic accommodations act. But, rather than claiming its own freedom of association, it is claiming that of clubs which are not parties to this lawsuit, including that of the Duarte club, which is the plaintiff.

International may not speak for the local clubs, and certainly not for Duarte. This is so not only because of the autonomy of the local clubs [J.A. 35] but also because no action has been taken nor threatened against them. They have not been injured. See Sierra Club v. Morton, 405 U.S 727, 739 (1972).

Accordingly, the case International argues is not before this Court and

it is not supported by a record.[26] Aside from the few rules International imposes on the local clubs and evide that Rotarians deduct their dues from their income tax returns, there is no evidence as to the actual practices of the local clubs or their members.

The trial court's order requires International to reinstate Duarte and enjoins it from enforcing its male-only policy against Duarte. See attached appendix pp. 1-2. No order of any kind was issued against Duarte nor any local club. Nor was any order issued "requir-[ing] the admission of females to all-

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[26]This Court should decline the invitation of amicus curiae Boy Scouts of America for the Court decide in this case whether it and/or its troops may be subject to a state's anti-discrimination statute.

male local Rotary clubs" as stated by International in its first Question Presented [at i] and as argued by it throughout its brief.[27]

If a case involving a local club's denial of admission to a women should arise, it will then be time enough to consider the case in light of the facts pertaining to that club.

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[27]The statement by the court of appeal [J.S. App. C-27] that Duarte is a business establishment within the Unruh Act is not the judgment in this case. It was not necessary for the Court's decision. The statement is appropriately ignored because "[t]his Court . . . reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956).

CONCLUSION

The appeal should be dismissed or the decision below affirmed. Should the Court treat the jurisdictional statement as a Petition for Writ of Certiorari, the petition should be denied.

Respectfully submitted,

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Counsel of Record
SANFORD K. SMITH
BLANCHE C. BERSCH
PAUL HOFFMAN
FRED OKRAND
Attorneys for Appellees

January, 1987

APPENDIX

(TITLE OF COURT AND CAUSE OMITTED)

ORDER AND JUDGMENT ENTERED IN RESPONSE TO COURT OF APPEAL DECISION

WHEREAS the Court of Appeal issued an opinion herein on March 17, 1986 which is reported as Rotary Club of Duarte v. Board of Directors, 178 Cal.App.3d 1035; and WHEREAS the Court of Appeal directed this court to enter a new and different judgment in favor of Plaintiffs, 178 Cal.App.3d at 1067-1068;

NOW THEREFORE IT IS ORDERED AND ADJUDGED AS FOLLOWS:

FIRST. An injunction is hereby issued mandating the Board of Directors of Rotary International and Rotary District 530 to reinstate Rotary Club of Duarte's charter thereby reinstating it as a member of Rotary International and Rotary District 530. See 178 Cal.App.3d at 1067-1068.

SECOND. Rotary International and Rotary District 530 are permanently enjoined from enforcing or attempting to enforce its male-only membership restriction against Rotary Club of Duarte. See 178 Cal.App.3d at 1068.

THIRD. Nothing herein shall prevent, or can it prevent, Rotary International from adopting or attempting to enforce its membership rules or restrictions outside the State of California. See 178 Cal.App.3d at 1066.

Costs are awarded to plaintiffs in the sum of $_____.

DATED: Sept. 16, 1986 .

/s/ Max F. Deutz
Max F. Deutz
Judge of the Superior Court

MINUTE ORDER OF JULY 25, 1985

HONORABLE P.G. BRECKENRIDGE, JR. JUDGE

CASE NO. C365529

TIMOTHY CURRAN VS. MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA

Counsel for Plaintiff SLAFF, MOSK & RUDMAN
BY: GEORGE SLAFF
AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA
BY: PAUL L. HOFFMAN

Counsel for Defendant HUGHES HUBBARD & REED
BY: RONALD C. REDCAY AND
B. ERIN RUDERMAN

Motion of defendant-respondent Mount Diablo Council of the Boy Scouts of

America, for Summary Judgment, OR in the alternative, for summary adjudication of issue

(fourth cont.)

(TAKEN UNDER SUBMISSION

7-9-85 Dept. 82)

Motion of defendant-respondent for Summary Judgment, denied.

Motion for summary adjudication of issues granted, "Plaintiff-petitioner, Timothy Curran was not a member of the Boy Scouts of America on or immediately before November 28, 1980, and therefore was not expelled from membership in Boy Scouts of America." However, plaintiff is granted 30 days leave to amend to allege that he was "excluded" from membership. Plaintiff must file a complete second amended complaint/petition for Writ of Mandate. Defendant's previously filed answer

shall have the same force and effect as though filed responsively to such second amended complaint.

Motion of plaintiff-petitioner Timothy Curran for Summary Judgment, OR in the alternative, for summary adjudication of issues;

AND

Motion to amend complaint

(third cont)

(TAKEN UNDER SUBMISSION

7-9-85 Dept. 82)

Motion for summary judgment, denied.

Re plaintiff's motion for summary adjudication of issues:

1. Established as alleged by plaintiff as without substantial controversy: Nos. 16, 17, 19, 20, 21, 22, 26, 27, 28, 29, 30, 31, 32;

2. Established as without substantial controversy, but as modified by the Court to conform to evidence:

No. 14. Defendant has for several years operated a trading post of service in Walnut Creek where it sells a variety of items.

15. Sales at the trading post during 1983 grossed approximately $57,000 or $58,000, with a difference between gross sales and costs of approximately $8,000.

18. In 1983, $223,000 out of defendant's total revenues of $759,000 came from United Way.

23. The Boy Scouts of America (BSA) licenses nationally approximately 2000 stores to sell uniforms, equipment, books, and other official scounting paraphernalia to scout membership

3. Issues still disputed

a) 24, 25-(The Court has not been provided with Tarr deposition exhibits-however it appears that the defendant's objection to the terminology "net profit" is well taken.

b) 35-In this regard, the Court is of the opinion that the Unruh Act does not apply to associations which are protected by the first and fourteenth amendments to the U.S. Constitution. There are issues of fact and disputes as to whether the defendant is a truly private organization within the criterion

expressed in Roberts v. U.S. Jaycees (1984) 104 S.CT 3244. See defendant's response to issue number 34 and Alexander declaration.

Counsel for plaintiff to prepare and serve an attorney order.

A copy of this minute order is mailed to counsel as indicated above.